LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 29
JOHN F. DAVIS, CLERK

Nos. 642, 680, 691, 813, 814, and 815

IN THE

Supreme Court of the United States

October Term, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND SUPPORTING MEMORANDUM OF APPELLEES GREATER PHILADELPHIA CHAMBER OF COMMERCE AND CHAMBER OF COMMERCE OF GREATER PITTSBURGH

DONALD L. WALLACE
Counsel for Appellees
Greater Philadelphia
Chamber of Commerce and
Chamber of Commerce of
Greater Pittsburgh
120 Broadway
New York, New York 10005
Tel. No.: DI 9-2020

C. BARRY SCHAEFER
Of Counsel

Dated: New York, New York
December 30, 1966

Nos. 642, 680, 691, 813, 814, and 815

IN THE

Supreme Court of the United States

October Term, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Motion to Affirm

Appellees Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Greater Pittsburgh move this Court to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

DONALD L. WALLACE
Counsel for Appellees
Greater Philadelphia
Chamber of Commerce and
Chamber of Commerce of
Greater Pittsburgh
120 Broadway
New York, New York 10005
Tel. No.: DI 9-2020

Dated: New York, New York
December 30, 1966

Nos. 642, 680, 691, 813, 814, and 815

IN THE

Supreme Court of the United States

October Term, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM IN SUPPORT OF APPELLEES' GREATER PHILADELPHIA CHAMBER OF COMMERCE AND CHAMBER OF COMMERCE OF GREATER PITTSBURGH MOTION TO AFFIRM

INDEX

PAGE

Statement 1

Argument 3

Conclusion 9

CITATIONS

Cases:

Associated Securities Corp. v. Securities & Exchange Comm'n, 283 F. 2d 773 (10th Cir. 1960) 7

Boston & Maine R.R. v. United States, 202 F. Supp. 830 (D. Mass. 1962), aff'd *per curiam* sub nom. Baltimore & Ohio R.R. v. Boston & Maine R.R., 373 U. S. 372 (1963) 4

Eastern Air Lines, Inc. v. Civil Aeronautics Bd., 261 F. 2d 830 (2d Cir. 1958) 3, 7

Erie-Lackawanna R.R. v. United States, 259 F. Supp. 964 (S. D. N. Y. 1966) 7n

Illinois Central R.R. v. Interstate Commerce Comm'n, 206 U. S. 441 (1907) 8n

Nalco Chemical Co. v. Hall, 347 F. 2d 90 (5th Cir. 1965) 7

Pennsylvania R.R.—Merger—New York Central R.R., 327 I.C.C. 475 (1966) 3n, 5n, 6n

United States v. Lowden, 308 U. S. 225 (1939) 3n, 5

Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F. 2d 921 (D. C. Cir. 1958) 3, 7

PAGE

Yakus v. United States, 321 U. S. 414 (1944) 7
Young v. Motion Picture Ass'n of America, Inc., 299 F. 2d 119 (D. C. Cir.), cert. denied, 370 U. S. 922 (1962) 7

Statute:

Judicial Code:
28 U. S. C. §1253 7

MEMORANDUM IN SUPPORT OF APPELLEES' GREATER PHILADELPHIA CHAMBER OF COMMERCE AND CHAMBER OF COMMERCE OF GREATER PITTSBURGH MOTION TO AFFIRM

Statement

Appellees, the Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Greater Pittsburgh (hereinafter called "Chambers") appear before this Court in accordance with the opinion of October 18, 1966, 17 L.ed. 2d 18 (1966), wherein permission was granted for the filing of motions and briefs on the merits responsive to the jurisdictional statements and briefs on the merits of appellants, and move herewith to affirm the decision of a special three-judge United States District Court, Southern District of New York, denying applications of Baltimore and Ohio Railroad, *et al.*, Erie Lackawanna Railroad Company, Delaware and Hudson Railroad Corporation and Milton Shapp, *et al.* (hereinafter called "petitioners"), for a stay of consummation of the merger between the Pennsylvania Railroad Company and the New York Central Railroad Co. (hereinafter the "merger") authorized by the Interstate Commerce Commission in an opinion rendered on April 6, 1966, 327 I.C.C. 475, and supplemented on September 16, 1966, Finance Docket No. 21989.

The merger proceedings before the Commission were commenced on March 9, 1962, and following extensive hearings the Examiners submitted a report and order, dated March 29, 1965, recommending approval of the merger subject to numerous conditions directed at protecting *inter alia* certain carriers and labor. The Commission adopted the ultimate recommendations of the Examiners in its report of April 6, 1966, permitting the merger to be consummated on June 1, 1966.

Petitions for reconsideration forced the Commission to postpone the effective date until September 30, 1966. Of all original petitioners only Milton J. Shapp and a few Pennsylvania communities questioned the desirability of the merger; the others objected to its consummation prior to determinations in other merger proceedings and questioned the efficacy and extent of the protective conditions imposed. On August 29, 1966, although the Commission had not yet reported on the petitions for reconsideration, it declined applications for a further postponement.

Certain petitioners then brought an action in the court below seeking an interlocutory injunction to enjoin orders of the Commission permitting immediate consummation of the merger. The court below signed an order temporarily restraining consummation until it could reach a determination. In the interim, on September 16, 1966, the Commission issued its report on reconsideration remanding the question of conditions to the Examiners for re-hearing but permitting immediate consummation of the merger. On October 4, 1966, the court below denied petitioners' applications for a stay. These petitioners, with only Shapp and the City of Scranton objecting to the merger itself, now appear as appellants before this Court.

ARGUMENT

A showing that immediate promulgation of the Commission's order would result in "harm to the public interest" is a fundamental prerequisite to a granting of the desired stay. *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 259 F. 2d 921, 925 (D. C. Cir. 1958); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 261 F. 2d 830 (2d Cir. 1958).

The Chambers, perhaps more than any other parties before this Court, represent the "public interest" in the sense that it is used here:

> public interest . . . is not a mere general reference to public welfare, but . . . has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities.[1]

Both Chambers are thoroughly familiar with and representative of the business and economic interests in their respective metropolitan areas. The Greater Philadelphia Chamber of Commerce, a non-profit corporation, is the second oldest Chamber of Commerce in North America and has served an eight county area in and around Philadelphia since 1800. According to the findings of the Interstate Commerce Commission Hearing Examiners, this area, encompassing the counties of Philadelphia, Bucks, Chester, Delaware and Montgomery in Pennsylvania and Burlington, Camden, and Gloucester in New Jersey, is a major economy in its own right with a population in excess of 4,000,000 people and is the fourth largest metropolitan

[1] *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 494 (1966), quoting *United States* v. *Lowden*, 308 U. S. 225, 230 (1939).

area in the United States ranking third only to New York and Chicago in territory.[2] Its five counties in Pennsylvania contain one-third of the State's population, and the industry in this area contributed 3.42 per cent of the total of value added (G.N.P.) in the United States in 1961. As of 1961 the various industries in the Greater Philadelphia Area employed more than 542,000 persons in a large variety of positions.[3]

The Port of Philadelphia, comprised of ports located on the Delaware River and its tributaries from Trenton, N. J., to Wilmington, Delaware, is second only to the Port of New York in total tonnage moved through the port and first in tonnage moving in foreign commerce.[4] This port, because of its geographical position and lower operating costs, commands a definite advantage over the Port of New York, despite the possible elimination of rate differentials as determined in *Boston & Maine R.R.* v. *United States*, 202 F. Supp. 830 (D. Mass. 1962), aff'd *per curiam* sub nom. *Baltimore & Ohio R.R.* v. *Boston & Maine R.R.*, 373 U. S. 372 (1963).

The Chamber of Commerce of Greater Pittsburgh is similarly concerned with and representative of the economy of the Greater Pittsburgh area which, together with the City of Pittsburgh, embraces about 3,000 square miles. The Examiners found that this area, with a population of 2,500,000, was heavy-industry-oriented and that 48 per cent of those employed there in 1960 were engaged in the production of primary metals. They also found that it has suffered a continued decline in employment in the past

---

[2] *Recommended Report and Order*, March 29, 1965, Appendix B to Brief of Appellant, Delaware and Hudson Railroad Corporation, p. 259.

[3] *Ibid.*

[4] *Id.* at 260.

two decades and that since 1947 such decline has amounted to 20 per cent.[5]

The interests of these two industrial areas are, therefore, characteristic and representative of those interests to be considered in granting such a stay. *United States* v. *Lowden*, 308 U. S. 225 (1939).

In their appearances before the Hearing Examiners both Chambers testified to the composition and economic background of their respective metropolitan areas, as set forth above, and the Examiners incorporated the testimony into their report to the extent that it represented an economic and industrial synthesis. With respect to Pittsburgh, the Examiners cited the facts that 60,168,880 tons of traffic moved through the Pittsburgh Switching District in 1961 and that the Pennsylvania Railroad controlled a major portion of it, as bases for concluding that railroads handle a substantial volume of new materials and products moving to or from the Pittsburgh District and that the proposed merged system would play a dominant role in handling this rail traffic.[6]

The Commission adopted these findings in its initial report and concluded that rail service in Pennsylvania would be substantially improved by the merger, that the economy of the Commonwealth would benefit through the expected influx of new industry attracted there by the improved rail facilities, and that the concentration of maintenance and construction yards in Pennsylvania would bring new employment.[7]

It moved toward assuring these benefits by ordering that the merged company enter into reciprocal switching

---

[5] *Id.* at 261.

[6] *Id.* at 262.

[7] *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 492-93 (1966).

arrangements with all rail carriers in the Pittsburgh Switching District to permit all carriers there mutual access to all plants, tracks and sidings in the District.[8]

These conclusions and those relating to other aspects of the "public interest" supported the Commission's general conclusion that

> the economies realized through the merger operations will redound in large part to the benefit of shippers, and thus to the general public, either through improved service thereby made possible or lower rates,[9]

and specific rejection of applications to delay the merger:

> accordingly, we find that, with the reservations hereinafter discussed to protect E-L, D&H and B&M, it would not be in the public interest to deprive the applicants of the immediate benefits of the merger or their shippers, of the improved service the merger will provide.[10]

The Commission was equally intransigent on petition for reconsideration:

> A day's delay at the outset of the undertaking can only mean a day's delay at its conclusion, and, thus, every day that consummation is postponed denies the shipping and consuming public, as well as the management and owners of these railroads, the many benefits which we found stem from the transaction we approved.[11]

---

[8] *Id.* at 554.

[9] *Id.* at 491.

[10] *Id.* at 531.

[11] *Pennsylvania R.R.—Merger—New York Central R.R.*, Supplemental report and order of September 16, 1966, Appendix B to Jurisdictional Statement of Appellants Baltimore and Ohio Railroad Company, p. B-15.

When the same question came before the court below, it specifically deferred to the expertise of the Commission and denied petitioners' application for a stay:

> It is not for us to deprecate the public and private advantages of permitting the applicants to proceed with the many important projects long on the drawing board whose importance to the national welfare and defense the Commission fully understands and we do not . . . .[13]

It held that petitioners had failed to discharge their burden of showing that the public interest would not be harmed by the delay as required by *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 259 F. 2d 921 (D. C. Cir. 1958) and *Eastern Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 261 F. 2d 830 (2d Cir. 1958).

In order for appellants to prevail in their application to this Court pursuant to 28 U. S. C. §1253, they must show that the court below abused its discretion in denying a stay. *Yakus* v. *United States*, 321 U. S. 414, 440 (1944); cf. *Nalco Chemical Co.* v. *Hall*, 347 F. 2d 90 (5th Cir. 1965); *Young* v. *Motion Picture Ass'n of America, Inc.*, 299 F. 2d 119 (D. C. Cir.), cert. denied, 370 U. S. 922 (1962).

By deferring to and adopting the findings of the Commission, the court below adhered to the principle established in *Associated Securities Corp.* v. *Securities & Exchange Comm'n*, 283 F. 2d 773 (10th Cir. 1960), that primary responsibility rests with the administrative agency and its determinations should not be upset without cogent reasons. In fact, it specifically recognized that questions of railroad mergers come before the court with the "im-

---

[13] *Erie-Lackawanna R.R.* v. *United States*, 259 F. Supp. 964, 981 (S. D. N. Y. 1966).

primature of the 'tribunal appointed by law and informed by experience.'" [18]

Therefore, it is apparent that adoption of the Commission's findings by the court below was consistent with the accepted policy of deferring to the fact-finding capabilities of the administrative body concerned and there was nothing in the Examiners' or the Commission's report to support the allegation that denial of a stay was, on its face, contrary to facts before the court or in any way a clear abuse of discretion.

[18] *Id.* at 971, citing *Illinois Central R.R.* v. *Interstate Commerce Commission*, 206 U.S. 441, 454 (1907).

CONCLUSION

Appellees conclude that the findings and considerations of the Commission with respect to the public interest aspect of the proposed merger, and particularly with respect to its effect on the areas of Greater Philadelphia and Greater Pittsburgh, were supported by the evidence before it, that the court below was justified in exercising its discretion in adopting these findings and rejecting petitioners' application for a stay, and that its refusal to grant a stay was in no way an abuse of its discretion. Appellees respectfully pray that the judgment of the court below be affirmed.

Respectfully submitted,

DONALD L. WALLACE
Counsel for Appellees
Greater Philadelphia
Chamber of Commerce and
Chamber of Commerce of
Greater Pittsburgh
120 Broadway
New York, New York 10005
Tel. No.: DI 9-2020

C. BARRY SCHAEFER
Of Counsel

Dated: New York, New York
December 30, 1966